No. 448.

IN THE

Supreme Court of the United States

October Term, 1955.

UNITED STATES OF AMERICA,
Appellant,

v.

McKESSON and ROBBINS, INCORPORATED,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR McKESSON AND ROBBINS, INCORPORATED.

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INDEX.

CITATIONS.

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BRIEF FOR McKESSON AND ROBBINS, INCORPORATED.

Restatement of Question Presented.

Are fair trade contracts between a manufacturer of competitive brand-named merchandise and independent wholesalers of that merchandise, otherwise concededly legal under the Miller-Tydings and McGuire Acts, rendered illegal when the manufacturer also functions as a wholesaler?

Further Statement as to Statutes Involved.

The Miller-Tydings Act (Act of August 17, 1937, 50 Stat. 693) added to the Sherman Act, 15 U. S. C. 1, two proviso clauses which authorized fair trade contracts

when consistent with state law. This statute, on which the Government relies, has remained unchanged since 1937.[1]

The McGuire Act (Act of July 14, 1952, 66 Stat. 632) amended 15 U. S. C. 45(a), and contained additional subparagraphs not cited by the Government.

Subparagraph (3) of the McGuire Act validates enforcement of fair trade resale prices against "non-signers", thus modifying the effect of the decision of this Court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

Subparagraph (4) of the McGuire Act reads as follows:

> "(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce."

Statement.

The only products involved here are brand-named drug products which are manufactured by McKesson & Robbins, Incorporated ("McKesson"), and distributed in the sharply competitive market shared by many other brands of similar merchandise produced by others. McKesson has been a manufacturer for more than 100 years (R. 66) and has a separate manufacturing division, known as the McKesson Laboratories, at Bridgeport, Connecticut (R. 53). McKesson products are "fair-traded" in states where this is lawful.

[1] So far as we know, this is the first action in which the Government has asserted that fair trade protection is restricted to single function manufacturers who distribute only through independent, non-competing outlets, although most American manufacturers are also part wholesalers, part jobbers, part retailers, etc.

For the year ending June 30, 1952, the total gross sales by the Laboratories of McKesson brand products amounted to approximately $11 million (R. 66). Of this total, sales of about $8.3 million were made to the 74 independently operated wholesale divisions of McKesson. Direct sales of $763,767 were made by the Laboratories to 23 other wholesalers. Of these 23 wholesalers, 10 are located in trading areas which overlap in whole or substantial part the trading areas of 7 McKesson wholesale divisions (R. 30, 37, 60-61). Sales by the Laboratories to these 10 wholesalers amounted to only $283,462 (R. 30-31).[1]

The balance of the Laboratory sales, about $2 million, were made largely to chain stores and similar bulk purchasers, who, while retailers, in fact perform a portion of the storage and distributing functions of wholesalers[2] (R. 60, 201), as is shown by the letters from many of these direct purchasers (R. 202, 222, 232, 239, 243 and 246). In recognition of the additional function performed by these retail bulk purchasers, a 20% discount is given (R. 200). Such sales are traditionally made direct by the manufacturer, since the customer's storage and distribution facilities dispense with the need for the usual wholesaler. This type of sale is not competitive with sales by wholesalers, who usually sell in small amounts to individual retailers, the average order being $45 (R. 155). The direct sales by the Laboratories reach an essentially different market.

The Laboratories bills all its wholesaler customers, including the 74 McKesson wholesale divisions, at the uniform published fair trade list prices less a discount of 25% (R. 200). Sales to retailers are made at the published

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[1] There is some fringe competition in an unstipulated amount in 6 additional wholesale division areas (R. 61-63).

[2] See *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490; Maynard and Beckman *Principles of Marketing*, 5th Edition, 1952, pp. 329-30.

fair trade list prices less smaller discounts ranging from 10% to 10% and 5% (i.e. 14.5%), except that on single shipments of $1,000 or more, a 20% discount is allowed (R. 200).

The Laboratories has established uniform fair trade resale prices which apply to all wholesalers, including the wholesale divisions of McKesson, and to retailers, and has entered into fair trade contracts in connection with such resale prices. McKesson adopted a universal contract system after the *Schwegmann* decision, *supra.*

Resale prices by wholesalers to retailers range from 10% to 10% and 5% (i.e. 14.5%) less than list, depending on quantity (R. 200), except that on single shipments of $1,000 or more, no resale price is now fixed[1] (R. 209).

The 74 wholesale divisions of McKesson operate independently of the Laboratories in function, organization and personnel (R. 65, 70-72). The relationship between the Laboratories and the wholesale divisions is essentially the same as between every other manufacturer and the divisions (R. 158-9). The preparation and enforcement of fair trade contracts is lodged exclusively in the Laboratories (R. 56), despite the appellant's contrary inference from McKesson's efforts after *Schwegmann* to obtain contracts from all wholesalers (brief, pp. 9 and 10).

Each wholesale division, which is in fact a local wholesaler in its own area (R. 6, 31, 36), functions as a warehouse of drug products of all manufacturers, and sells a complete drug line to local retailers, who want quick delivery, often daily deliveries, of small amounts (R. 155).

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[1] As the average order received by wholesalers amounts to about $45 (R. 155), it was formerly believed that wholesalers would not get single orders for as much as $1,000 of McKesson products (R. 121). During preparation for trial, however, it was discovered that on "rare" occasions, some wholesalers did receive orders of this size (R. 69). McKesson's fair trade contracts were promptly revised to exclude from their coverage single sales of $1,000 or more (R. 209).

From time to time, the McKesson wholesale divisions are requested by other wholesale houses in the same area who carry no stocks, or limited stocks, of McKesson brand merchandise to supply small amounts to enable those houses to fill orders. These "accommodation" sales are made as a matter of courtesy (R. 40, 55, 148-149). Their effect, of course, is to increase competition since the courtesy sales strengthen the competitive position of the other wholesalers. The total of such sales runs to about $200,000, or an average of about $1,600 yearly to each of the 127 outside houses to whom courtesy sales were made (Annex to Item 14, Answer to Supplemental Interrogatories). In contrast, the average sales of McKesson brand products made by the McKesson wholesale divisions amounted to approximately $110,000 annually (R. 31).

The above statements account for all the sales of McKesson brand drug products which are the only sales involved in this action.

The other products which the McKesson wholesale divisions sell and the amount of such sales are not relevant, since McKesson does not establish the fair trade prices for such other products.

Summary of Argument.

The purpose of fair trade legislation is to permit a manufacturer of competitive brand merchandise to protect his good will by price maintenance contracts. This necessarily involves elimination of price competition between different outlets for the manufacturer's own brand merchandise. By amended legislation, price maintenance may also be enforced against "non-signers".

Congress, by a positive grant of authority, has affirmatively approved fair trade contracts in interstate commerce

when lawful under state law. This applies only to trade-marked or brand merchandise. The legislation lays down its own definition of competition: the commodities must be sold competitively with other similar brand merchandise. It is undisputed that McKesson solely *as a manufacturer* has the right to fair trade its own competitive brand merchandise.

The Government bases its entire case on the statutory proviso which inhibits contractual price fixing between manufacturers, wholesalers, retailers or competitors. The Government's contention is that McKesson, which acts as a wholesaler and also sells direct to certain classes of retailers, is thereby forbidden *as a manufacturer* to make fair trade contracts for the protection of its good will and its own competitive brand products.

This interpretation gives no effect to the purpose of the legislation and violates the fundamental canon that all parts of a statute must be read together. When read as a whole, the statute is seen to validate manufacturers fair trade contracts when made vertically down the channels of distribution of the brand merchandise. The statute declares that resale price contracts are invalid only when they lie outside the normal downstream flow of the product from the source, i. e. the manufacturer, through the succeeding channels of distribution, such as contracts made between manufacturers of different products or contracts made between wholesalers of the same product not produced by any of them. In distinguishing between "vertical" and "horizontal" contracts, Congress intended to authorize vertical or downstream arrangements between a seller and a buyer on different levels of distribution.

The legislative history supports our position.

As was well known to Congress, the American genius for production and distribution is not confined to limited

or rigid relationships. Among many other ways, a manufacturer may sell through salesmen, wholesalers, direct mail, jobbers, exclusive distributors, or factors. Government statistics show that most manufacturers are also technically wholesalers or retailers.

For 15 years the Government made no effort to assert the claim it now makes here. The Federal Trade Commission, which is specifically charged with enforcement of the McGuire Act (subdivision 6), has rejected the same claim. The economic effect of fair trading is the same whether or not the manufacturer is integrated. What channels are used by a manufacturer who has fair traded his brand products to bring these products to the consuming public is a matter of individual choice and trade custom. The method of distribution has no relevance to the issue of violation since the manufacturer, McKesson, has not made any horizontal price fixing arrangements with any other manufacturer. On the contrary, pursuant to the statute it made at the source, as a manufacturer, valid downstream price fixing arrangements with its outlets. Since such pricing by McKesson became effective in each instance on the first transaction by which its products entered the stream of distribution, the vertical nature of the transactions cannot be disputed. Hence, there is no illegality.

It does not advance the solution of the issue to urge, as the Government does, that price fixing is illegal *per se* (brief, pp. 14-17, 25-28). What is involved here is resale price maintenance pursuant to fair trade legislation in protection of the good will attaching to brand products. This is *legal per se*, as this Court has held since *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183 (1936).

ARGUMENT.

I.

The purpose of the legislation is to protect the good will of the manufacturer by permitting him to maintain resale prices on his competitive brand merchandise. This protection necessarily involves elimination of price competition among different outlets for the manufacturer's own branded merchandise.

Twenty years ago this Court sustained the constitutionality of state legislation which authorized resale price maintenance contracts. *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936). In its opinion, at page 193, the Court stated the purpose to be achieved by such laws:

> "The primary aim of the law is to protect the property—namely the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself."

The Court further explained, at page 194:

> "We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the market or the good will that the market symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of com-

modities. And distinctive trademarks, labels and brands, are legitimate aids to the creation or enlargement of such good will."

The Miller-Tydings Act was enacted shortly after the *Old Dearborn* decision and affirmatively approved protection of good will and brand names in interstate commerce provided that such protection was valid under state law and that brand competition was preserved. The McGuire Act reaffirmed the earlier legislation and made it applicable also to "non-signers." The effect of this legislation does not depend on whether the manufacturer is integrated or non-integrated.

Even in *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, on which the appellant relies, this Court assumed the validity of fair trade contracts at the wholesale level where the manufacturer was a wholesaler whose wholesale outlets accounted for 60% of the sales made to retailers. While the fair trade contracts in that case were set aside because they "came into existence as a patch upon an illegal system of distribution" (p. 724), this Court made it clear in footnote 5 on page 724 that such a system of price maintenance contracts would otherwise be valid;

> "We do not understand the opinion of the District Court to impugn the validity of bilateral contracts, identical in form between a producer or distributor, on the one hand, and their customers on the other, entered into under the Miller-Tydings Act."

The court accordingly approved a decree permitting the execution of new fair trade agreements between the same parties and on the same terms at the end of a six month period of suspension.

The ruling of this Court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) was that the Miller-Tydings Act did not authorize enforcement of fair trade prices against "non-signers", a defect in the fair trade structure which was cured in 1952 by the McGuire Act. Congress thus evidenced a firm intention to support and legalize fair trade in interstate commerce when valid under state law.

United States v. *Masonite Corp.*, 316 U. S. 265, relied upon by the appellant, did not involve fair trade contracts. They were principally horizontal agreements among competing manufacturers fixing the prices at which the products of one of them should be sold. Even if the agreements had been fair trade contracts, they would not have qualified as valid under the Miller-Tydings Act and McGuire Act.

See also *Eastman Kodak Company* v. *Schwartz* (not reported officially) 133 N. Y. S. 2d 908 (Sp. Ct. N. Y. Co. 1954), which held under the McGuire Act that a manufacturer may fair trade at the retail level even though the manufacturer operates competing retail outlets. See also the *Eastman Kodak* decision of the Federal Trade Commission, *infra*.

Thus the appellant's arguments and numerous citations of authority (brief, pp. 25-34), however valid they may be in other fields, have no relevance to the legislative area of fair trade.

Congress has provided protection for a manufacturer's good will by permitting price maintenance contracts and resale price enforcement even against "non-signers". Such protection eliminates price competition at every functional level, provided that, as is the fact in this case, brand versus brand competition exists.

II.

The legislative history of both the Miller-Tydings and McGuire Acts shows that Congress intended to extend fair trade to integrated manufacturers, such as McKesson.

The legislative history of the federal fair trade statutes, including both Committee reports and the statements of legislators, confirms the interpretation that a manufacturer should not be denied fair trade protection of his own competitive brand products at the wholesale level simply because he also distributes such products through his own outlets.

Miller-Tydings Bill.

(1) Committee Reports.

From the earliest reports on the bills which eventually were enacted as the Miller-Tydings Act, it was apparent that the proponents of this legislation were interested in assuring brand versus brand competition and in preventing the extension of fair trade into general price fixing by groups of manufacturers, producers, wholesalers or retailers.[1]

The State laws did not "authorize horizontal contracts, that is to say, contracts or agreements between manufacturers, between producers, or between wholesalers, or between retailers as to the sale or resale price of any commodity."[2]

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[1] See Senate Report 2053, 74th Cong.; House Report 382, 75th Cong.; Senate Report 879, 75th Cong. recommending the enactment of Title VIII of H. R. 7472 which finally became the Miller-Tydings Act.

[2] Senate Report 879, 75th Cong., p. 6.

The proviso in the Miller-Tydings Act, being the second proviso in the Sherman Act (15 U. S. C., Sec. 1), carried over the provision of the state laws, but added the words "brokers" and "factors" and the general catch-all phrase "persons, firms or corporations in competition with each other". This language embraced, for example, horizontal agreements between jobbers, between broker and factor, between wholesaler and jobber, between the jobber and the factor, and similar types of relationships. The Congressional history is silent with reference to this catch-all provision. There is every indication, however, that *any* legitimate manufacturer with a bona fide interest in the good will of his own brand products should be entitled to obtain price protection wherever brand versus brand competition existed.

(2) Representative McLaughlin's Statement.

Representative McLaughlin, a member of the House Judiciary Committee which considered a prior draft of the Miller-Tydings bill (H. R. 1611) also spoke on the bill, saying, 81st Cong. Rec. 3138, (1937):

> "* * * As an example, the act would not allow two manufacturers of similar trade-marked articles, as, for instance, articles of food or drugs or clothing to soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold. The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply authorizes contracts, permitted by the States, between the seller and buyer of one article—contracts known as vertical contracts. It does not permit contracts between seller and seller of different articles—contracts known as horizontal contracts. The latter contracts, if violative of the

Sherman Act now, will still be violative of that act if H. R. 1611 becomes a law."

(3) Government's Acquiescence.

Thus, the Congressional history of the Miller-Tydings Act gives no support to the contention which the Attorney General advanced for the first time fifteen years later in 1952. On the contrary, such statements as appear in the record justify the inference that the Attorney General's long acceptance of fair trade by integrated manufacturers indicated his concurrence with the statements made to the House.

The failure of the Department for so many years to assert its present contention indicates doubt as to the validity of that position. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351.

McGuire Act.

Senator Humphrey's Statements.

On the floor of the Senate in 1952, Senator Humphrey, whom the Government characterizes as one of the leading proponents of the McGuire Act, made an extensive exposition of the difference between "vertical" and "horizontal" contracts in the fair trade field.

Senator Humphrey made it clear that fair trade was not to be denied to a manufacturer who was also a wholesaler or retailer, but that the test was whether the fair trade contract was made between a seller and a buyer.

In other words, Senator Humphrey said, a producer who is a wholesaler:

> "* * * may still lawfully make contracts with other wholesalers and retailers, when in making such contracts, they act as producers of a trade-marked or

branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts * * *".

The forbidden type of an agreement between wholesalers, as Senator Humphrey explained it, was one by which two wholesalers attempt to fix prices for products which neither produces.

Senator Humphrey's exposition occurred in a colloquy with Senator Sparkman in 98 Cong. Rec. 8870 (1952) which is set forth below (italics ours):

> "Mr. Sparkman. Mr. President, I should like to ask the Senator from Minnesota one or two questions in order to be absolutely clear in my own mind, and in order that the Record may be absolutely clear. I propound these questions to the Senator from Minnesota, because I know of the great interest he has in this proposed legislation, the work he has done on it, and his understanding of the facts and the background. Therefore, I should like to ask his opinion on these two questions.
>
> "Mr. Humphrey. I shall be glad to answer the Senator's questions if I can.
>
> "Mr. Sparkman. I have always been much concerned about horizontal resale price maintenance agreements which have been considered illegal. Do I correctly understand that this bill does not make that type of agreement lawful?
>
> "Mr. Humphrey. The Senator from Alabama is absolutely correct. This bill does not make lawful the type of agreement to which he refers. It is entirely clear from paragraph (5) of section 5 (a) of the Federal Trade Commission Act, as amended by this bill, that horizontal resale price-maintenance agreements such as between a wholesaler and a wholesaler, or between a retailer and a retailer, or a manufacturer and a manufacturer, are not made lawful. They are illegal and subject to prosecution.

It is only vertical resale price-maintenance agreements which are exempt from the antitrust laws when they meet the requirements of paragraph (2).

"Mr. Sparkman. It would dispel any misunderstanding concerning lawful vertical resale price-maintenance agreements and unlawful horizontal resale price-maintenance agreements if the Senator from Minnesota would explain further for the Record the differences between the types of agreements.

"Mr. Humphrey. I talked with the Senator about this matter, and I want to be very accurate. I have gone into it very carefully. Under this bill, a lawful vertical price-maintenance agreement is one entered into by the producer of a trade-marked or branded commodity, and the immediate or subsequent resellers of such commodity in the chain of distribution from producer to ultimate consumer, whereby the minimum resale price at either the wholesale or retail level, or both, is prescribed. If, for example, when a producer, who sells to distributors, wholesalers, retailers and consumers, makes a resale price-maintenance agreement relative to a commodity made by him and bearing a trade-mark or brand, with a distributor, wholesaler, or retailer who resells such commodity at either the wholesale, or retail level there exists a vertical resale price-maintenance contract which would be lawful under the bill if the requirements of paragraph (2) are met.

"On the other hand, *if one wholesaler enters into a resale price-maintenance agreement with another wholesaler* prescribing the price at which they both sell a trade-marked or branded commodity *which they both buy from the producer,* that agreement would be horizontal and would not be made lawful.

"In other words, wholesalers getting together on a price are acting illegally. For a manufacturer to get together with other manufacturers to maintain prices is illegal, but for a manufacturer to say that

a certain product will sell at a certain price from the manufacturer down to the retailer is legal under the limitations prescribed in paragraph (2) of section 5 (a) of the Federal Trade Commission Act.

"*In general, the test of whether a resale price-maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product;* whereas, the test of whether a resale price-maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

"It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. *While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers* entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.

"This question has been discussed in many colloquies on the floor, and I am happy to have it formalized by interrogation. But it should be clearly noted that price fixing between producers, price fixing between wholesalers, and price fixing between retailers is unlawful and should be prosecuted.

"Mr. Sparkman. And the bill does not propose anything which would change that illegality.

"Mr. Humphrey. That is correct. My admonition to the Federal Trade Commission and to the Justice Department is to keep a careful weather eye

open on the kind of horizontal price-maintenance agreements which are entered into, because those which are illegal should be prosecuted."

The fact is that the vote on the bill followed shortly after the colloquy between Senators Humphrey and Sparkman, and 64 senators voted for the McGuire bill and 16 against, without any expression of dissent from Senator Humphrey's remarks (98 Cong. Rec. 8891, 1952).

Indeed, there is not one sentence in the entire legislative history which conflicts with the interpretation given by Senator Humphrey. Cf. *Shaughnessy* v. *Pedriero,* 349 U. S. 48, 52.

III.

The economic effects of fair trading are the same whether the manufacturer is integrated or non-integrated.

So long as there is brand versus brand competition of similar products, it is immaterial whether the manufacturer also participates in the distribution process as a wholesaler or retailer.

The contrary doctrinaire arguments of the appellant (at, among other places, pages 17, 19 and 42-45 of its brief) are unsupported in the record and without substance. It is said (brief, p. 19) that:

> "If a manufacturer's own wholesale outlets are inefficient, he may seek to meet the problem by setting his 'fair trade' price higher than otherwise".

The same argument is repeated at page 44:

> "But an 'integrated' manufacturer is likely to fix resale prices primarily in relation to its own outlets,

and if these are inefficient the price thus fixed will tend to be higher than if the manufacturer were not also distributing its own products. See Note, 64 Yale L. J. 426, 431."

These and similar arguments completely ignore the purpose of the statute, as well as realities of economic life. McKesson, as an integrated manufacturer selling its own tooth paste and sun tan lotion, while free to fix its own prices, must sell the products in competition with the many other brands of tooth pastes and lotions. No manufacturer, integrated or not, can afford to fix an arbitrary high price for his competitive product. If he did, he would price himself out of the market.

As Mr. Brandeis (later Mr. Justice Brandeis) said in discussing trade mark protection:

> "The independent producer is engaged in a business open to competition. He establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition." ("Cutthroat Prices", Harper's Weekly for November 15, 1913, Vol. 58, pp. 10, 12).

IV.

Most manufacturers also act as wholesalers or retailers.

In the complex and fluid American economy few manufacturers adopt rigid methods of distributing their products and few indeed exclude themselves entirely from the distribution process as wholesalers or retailers.

The Federal Trade Commission, which is charged by law with administering the McGuire Act, recently held

under that act that a manufacturer who was also a retailer could fair trade at the retail level (*Eastman Kodak Company*, 3 CCH Trade Reg. Rep. (10th Ed.), par. 25,291). It found that for "sound business or economic reasons"—

> "* * * the practice of selling exclusively through 'regular channels' of distribution is almost becoming the exception rather than the rule."

A study of the Censuses of Business by Professors Maynard and Beckman of Ohio State University[1] reveals that 22% of all manufactured goods are wholesaled through outlets owned or operated by manufacturers, as compared with only 25% through independent wholesalers. The other 53% represents direct sales by manufacturers to industrial and other large users, to retailers, both manufacturer operated and independently owned, to consumers and to others than wholesalers.

The certified results of a survey made by the American Fair Trade Council of known fair trading manufacturers (R. 12, 15) reveals that 86% of all such manufacturers who responded to inquiries made of them sold "fair traded" products to wholesalers. Of this 86% who sold to wholesalers, 82% also sold to retailers, 34% also sold to consumers, 10% also have wholly-owned or controlled subsidiaries that sell to wholesalers, 9% also have wholly-owned or controlled subsidiaries that sell to retailers and 4% also have wholly-owned or controlled subsidiaries that sell to consumers.

Further evidence of business integration is found in 1948 U. S. Census of Business:

Bulletin No. 3-4 "The Electrical Goods Trade"—reports (p. 18) that in 1948 there were 1,326 "Sales branches and offices of electrical goods manufac-

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[1] *Principles of Marketing*, Fifth Edition, 1952, pp. 40, 41.

turers" defined (p. 9) as including "establishments maintained apart from manufacturing plants by manufacturing companies primarily for selling or marketing their products at wholesale. Sales branches or offices located at manufacturing plants or at administrative offices of manufacturers are excluded unless operated as separate and distinct businesses." The gross sales of such establishments for one year was reported (p. 18) as totaling $4,374,478,000.

Bulletin No. 3-13 "The Hardware, Plumbing and Heating Equipment Trade"—reports (p. 3) that there were 178 "Hardware manufacturers, sales branches and offices combined" and 890 "Plumbing, heating goods manufacturers, sales branches and offices combined" defined (p. VIII) as including "establishments maintained apart from manufacturing plants by manufacturing companies primarily for selling or marketing their products at wholesale. Sales branches or offices located at manufacturing plants or at administrative offices of manufacturers are excluded unless operated as separate and disstinct businesses." The gross sales of such establishments for one year was reported (p. 3) as totaling $1,201,749,000.

Bulletin No. 3-6 "The Drug Trade"—reports (p. 2) that in 1948 there were 327 "sales branches and offices of drug, proprietaries, toiletries manufacturers" defined (p. VIII) as "Establishments maintained apart from processing plants by manufacturers primarily for selling or marketing their products at wholesale. Sales branches or offices located at processing plants or at general administrative offices of processors are excluded unless operated as separate and distinct businesses." The gross sales of such establishments for one year was reported (p. 2) as totaling $692,500,000.

In the *Eastman Kodak* case, *supra,* the Federal Trade Commission carefully reviewed the McGuire Act, its legislative history, and the relevant authorities, none of which supports the appellant's position. The Commission considered statistics demonstrating the universal practice of manufacturers to operate outlets of their own at all levels of distribution and also to distribute through independently owned outlets. It concluded that it would be contrary to Congressional intent, unsupported by authority, and unrealistic in the light of known marketing methods to give the McGuire Act the interpretation now being urged by the appellant.

In rejecting the Government's contentions, the Commission stated:

> "The merchandising practices of respondent are in no sense unique. We can take judicial notice of the fact that many manufact ers are partially integrated and engage to a lesser or greater degree in some form of wholesaling or retailing activity. In fact the volume of direct selling in this country has reached tremendous proportions. This is so of manufacturers who 'fair trade' as well as with others. As a matter of fact the practice of selling exclusively through the 'regular channels' of distribution is almost becoming the exception rather than the rule. Sound business or economic reasons may justify such methods of distribution.
>
> "This common business practice was well known and generally accepted at the time of the enactments of the Miller-Tydings and McGuire Acts. In determining Congressional intent there is a strong presumption that Congress does not act in a vacuum and is fully informed as to contemporaneous conditions of common knowledge.
>
> "If resale price maintenance and partial integration are to be permitted when existing separately, the question s pertinent as to whether the combi-

nation of the two practices is detrimental to our economy. The present litigation which seeks to divorce them is supposed to be 'in the public interest' but counsel in support of the complaint give no hint of an economic basis for the action. It is true, of course, that as a result of respondent's fair trade agreements there is a uniformity of retail prices. But this would continue to exist even if respondent were ordered to divest itself of the 35 stores.

"An interesting discussion of several economic theories which might be broached for precluding the combination is contained in Prof. Weston's article on resale price maintenance. He suggests that it is unlikely that the combination either stimulates further integration, or tends to injure independent dealer competition. On the contrary there is respectable authority, he says, to the effect that resale price maintenance laws eliminate one of the strong incentives for integration and tend to increase the number of independent retailers and wholesalers.

"The interpretation of the statute now being suggested by counsel in support of the complaint comes rather late. It would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain but admittedly large economic consequences.

"It would require the Commission to rely on an unrealistic reading of the proviso in face of the fact that there is nothing whatsoever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns.

"Whatever this Commission or anyone else may think about the desirability or wisdom of eliminating price competition in a fair-traded product, that feeling must be laid aside. By the enactment of the Miller-Tydings and McGuire Acts, sanctioning the enforcement of State fair-trade laws, Congress

declared that the practice was not unlawful and not against the public interest."

The decision was reached after a full hearing on the facts ordered by the Commission following earlier consideration by it of the issues involved. It represents the unanimous determination (one Commissioner not participating) of the administrative agency charged with the duty of administering the McGuire Act, as specifically provided in subdivision (6). For this reason, as well as the soundness of the views expressed, the Commission's ruling is entitled to great weight. *United States* v. *Cerecedo,* 209 U. S. 337; *United States* v. *Jackson,* 280 U. S. 183.

As the Commission said, the interpretation of the statutes now being urged by the appellant would soon result in the grant of the power to "fair trade" being substantially swallowed up by the exceptions, and would completely frustrate the intent of Congress.

Conclusion.

We respectfully submit that the judgment of the District Court should be affirmed.

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